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No. 253

IN THE

Supreme Court of the United States

OCTOBER TERM 1952

UNITED STATES OF AMERICA, *Petitioner,*

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

FREDERICK A. BALLARD,
American Security Building,
Washington, D. C.

JOSEPH W. WYATT,
Wyatt Building,
Washington, D. C.,
Attorneys for Respondents.

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 43) is reported at 196 F. 2d 657. The several opinions of the District Court are reported at 89 F. Supp. 567 (R. 24), 89 F. Supp. 571 (R. 18), and 101 F. Supp. 172 (R. 36).

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1952 (R. 50). The petition for writ of certiorari was filed on August 5, 1952, and was granted on October 13, 1952. The jurisdiction of this court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the condemnation of an existing utility was authorized by Title II of the Lanham Act.[1]

2. Whether, if condemnation of an existing utility was authorized by Title II of the Lanham Act, the statutory prerequisites for such a taking were complied with in taking the Belle Haven sewer system.

3. Whether the taking of the Belle Haven sewer system was prohibited by the 1943 amendment to the Lanham Act expressly forbidding acquisition of existing public works "except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof," where

a) the record showed no allotment of funds for additions or improvements to the Belle Haven sewer system; and

b) the corporate holder of legal title consented to the taking only on a condition not fulfilled, and no consent was given by the abutting property owners who paid for the system and are required to use it.

STATUTES INVOLVED

Act of October 14, 1940 (Lanham Act), Title II, section 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. 1532:

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[1] Act of October 14, 1940, Title II, sec. 202, as added June 28, 1941, 55 Stat. 361-363, 42 U.S.C. 1531-1534.

"Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the [Federal Works Administrator][2] is authorized, with the approval of the President, in order to relieve such shortage—

"(a) To acquire * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works.

"(b) By contract or otherwise * * * to plan, design, construct, remodel, extend, repair, or lease public works, and to demolish structures, buildings, and improvements, on lands or interests in lands acquired under the provisions of subsection (a) of this section or on other lands of the United States which may be available, * * * provide proper approaches thereto, utilities, and transportation facilities, and procure necessary materials, supplies, articles, equipment, and machinery, and do all things in connection therewith to carry out the purposes of this subchapter.

"(c) To make loans or grants, or both, to public and private agencies for public works and equipment therefor, and to make contributions to public or private agencies for the maintenance and operation of public works, upon such terms and in such amounts as the Administrator may consider to be in the public interest. As used in this paragraph, the term 'private agency' means any private agency no part of the net earnings of which inures to the benefit of any private shareholder or individual."

[2] During all times relevant here the cognizant official was the Federal Works Administrator. The statute now reads "Housing and Home Finance Administrator."

had paid for the system and are, as the Court of Appeals said, "as truly the real owners of that system as if it had been built by them as a cooperative enterprise". (R. 50).

Argument

I.

THE PRESENT TAKING WAS NOT AUTHORIZED BY ORIGINAL TITLE II OF THE LANHAM ACT.

The basic statutory authority claimed for the taking is Title II of the Act of October 14, 1940, as added by the Act of June 28, 1941, 55 Stat. 361-363, 42 U. S. C. 1531-1534. This legislation is known as the Lanham Act. The relevant provisions are in section 202 of the Act (42 U. S. C. 1532), and are set out above at pages 2-3.

A. Title II of the Act did not authorize the taking of an existing utility.

Section 202(a) of the Act authorized the Federal Works Administrator, with the approval of the President, to acquire:

> "improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation * * * for such public works."

Subsection (b) provided for the construction of public works

> "on lands or interests in lands acquired under the provisions of subsection (a) * * *."

The statutory scheme contemplated the acquisition, under (a), of land upon which to construct public works under (b). Petitioner contends that "improved lands" literally covers lands "improved" by an operating utility (Brief for Petitioner, p. 11). This seems to suggest such an extreme stretching of "improved" as to be unacceptable on its face, particularly since

> "* * * it is to be borne in mind that the taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed." *Delaware, L. & W. R. Co.* v. *Morristown*, 276 U. S. 182, 192 (1928).

Petitioner's argument would ultimately encompass the taking of anything built on land, no matter how extensive, if it might have some present or future connection with "public works". In any event, the history of the Lanham Act, both prior and subsequent to the enactment of Title II in 1941, demonstrates that Congress did not intend to authorize any such taking.

1. *The history of the Lanham Act.*

The original Lanham Act (now Title I thereof) was the Act of October 14, 1940, 54 Stat. 1125-1126, 42 U. S. C. 1521-1524. Section 1 of the Act states its purpose as being

> "to provide housing for persons engaged in national-defense activities * * * in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities * * *."

It was soon found necessary to supplement the defense housing program by providing also public services for the congested areas. This was the purpose of the statute now before the court, see the preamble to section 202, at page 3, above.

Title II was drafted upon the pattern of Title I. Two bills, H. R. 3213 and H. R. 3570, originally introduced for the purpose, were redrafted as H. R. 4545, 77th Cong. 1st sess. H. R. 4545 became the final vehicle for the legislation. At the hearings the General Counsel to the Federal Works Agency testified with respect to H. R. 3213, whose wording was substantially the same, for present purposes, as in the final Act. He stated:

"And then authority is given to acquire land, improved or unimproved, and *upon the land so acquired to construct public works*, to maintain them and operate them, administer them, to sell them, to transfer them, and also to make loans and grants for all these purposes."[4] (Emphasis supplied.)

Nowhere in the legislative history is there intimation that Congress was even requested to authorize the taking over by the Federal Government of public utilities. Any such request would of course have stirred up the issue of public versus private power, and would never have been granted without voluminous discussion. Throughout the debates there was evidenced a serious concern by Congress lest authority for construction of schools might lead in some way to attempts by federal agencies to control their operation.[5] It seems plain that Congress would have rejected out-of-hand any proposal to authorize federal officials to take over local utilities. It also seems plain that the Federal Works Agency did not regard its proposal as having any such far-reaching consequences. As indicated above, its general counsel understood that the bill provided for the acquisition of land upon which to construct public works. And in 1943 the Administrator, in reporting to Congress on the operation of Title II, stated:

"*Authority of the Federal Works Administrator under Title II.*

Under title II the Federal Works Administrator is authorized:

(1) To *construct* community facilities as Federal projects.

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[4] Hearings before Committee on Public Buildings and Grounds on H.R. 3213 and H.R. 3570, 77th Cong. 1st sess. 59 (Testimony of Alan Johnstone, General Counsel, Federal Works Agency).

[5] This concern resulted in section 203(b), 55 Stat. 362, 42 U.S.C. 1533(b).

(2) To make loans or grants, or both, for the non-Federal construction of community facilities.

(3) To make contributions for the maintenance and operation of community facilities.

Loans, grants, and contributions may be made to public and private agencies, private agencies being defined as 'any private agency no part of the net earnings of which inures to the benefit of any private shareholder or individual.'" (Memorandum of Philip B. Fleming, Federal Works Administrator, attached to Report of Senate Committee on Public Buildings and Grounds, on H. R. 2936, Rep't. No. 376, 78th Cong. 1st sess., p. 3.) (Emphasis supplied.)

Finally, we have an express statement by Congress itself as to its intent which, while subsequent to the Act, appears to be authoritative. This resulted from an attempt by the Federal Works Agency to condemn, under Title II, an electric system in Puerto Rico. In 1942 the United States Court of Appeals for the First Circuit dismissed this condemnation, holding that the taking of an operating utility was not authorized by the Lanham Act. *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F. 2d 491 (1st Cir. 1942). In 1943, in connection with a bill increasing the appropriation authority under Title II, Senator Taft offered an amendment providing in part that

"none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies."

Senator Taft (who had been a member of the Committee on Public Buildings and Grounds, which had cognizance of the Lanham Act) explained his amendment as follows:

"Mr. President, the first clause of the Amendment provides 'that none of the funds authorized herein shall be used to acquire public works already operated by public or private agencies.'

"When the subcommittee of the Committee on Territorial and Insular Affairs were in Puerto Rico we

found that the F. W. A. took 10 million of this rather limited fund intended for the construction of works in connection with the housing in industrial areas and used it to acquire all the power companies of Puerto Rico, the San Juan Power Company and the Mayaquez Power Company. So far as I can see there was no real justification for that. As a matter of fact, the Federal Circuit Court in Boston subsequently held that there was an illegal application of those funds.

"I do not mean to say that it might not be desirable for the insular government, which owned a good many of the power facilities, the dams and the like, to take over the private power companies and consolidate them all into one system, but *certainly there was nothing in the Lanham Act which authorized any such proceeding. It was intended to provide new facilities, it was not intended to provide for taking over old facilities. I think it is perfectly clear that no such power should be included in the Act.*" (Emphasis supplied.) 89 Cong. Rec. 7286.

Senator Maloney, who was in charge of the pending bill, and had been in charge of the Lanham Act, replied as follows:

"Mr. President, I can see no objection to the amendments offered by the Senator from Ohio. I agree with him that Lanham Act funds, at least in my opinion—and I was one of those who helped to write the Act—were not intended to be used for such a purpose as the acquisition of a public utility in Puerto Rico. So I have no objection to the language and as a matter of fact I share the feeling of the Senator from Ohio." Id. at 7287.

The following day the excepting clause came into the amendment on further motion of Senator Taft, who stated:

"Mr. President, yesterday I offered an amendment which was agreed to. The Public Works Ageney objects to the limitation which provides 'that none of the funds authorized herein shall be used to acquire public utilities already operated by public or private agencies.'

"When the amendment was offered, I referred to the Puerto Rican case. The Public Works Agency cites a case of a railway connection with a naval plant in one of the western states where they must have the railroad in order to complete the whole railway project which the Navy desires. The railroad is worth, let us say, $1,000,000, and they are to put in $2,000,000 in order to complete the project. They have asked that in a case of that kind they be authorized to take over the existing work, where they are enlarging it. Even in such cases I do not think the authority should be given except with the consent of those who own the existing public works. Therefore I agree to an amendment so that the amendment would read: [Final form]." 89 Cong. Rec. 7314.

Senator Maloney was in charge of the 1943 bill, and had been in 1941 chairman of the committee reporting out Title II of the Lanham Act. His concurrence in Senator Taft's view that the Act "was not intended to provide for taking over old facilities" is authoritative. The opinion of the committeeman in charge of a bill is on a par with the committee report as authentic legislative history. *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 475 (1921); 2 Sutherland, *Statutory Construction* (3rd ed., Horack, 1943) sec. 5012.

We submit that it is clear that Congress did not intend at any time to authorize the condemnation of an operating utility under the Lanham Act (except in an isolated case as provided for in the excepting clause of the 1943 amendment).

B. The statutory prerequisites to a taking under Title II were not complied with here.

The Act provides that

"*Whenever the President finds* that in any area or locality an acute shortage of public works * * * exists * * * the Federal Works Administrator is authorized,

with the approval of the President, in order to relieve such shortage—

(a) To acquire * * * improved or unimproved lands or interests in lands * * *." (Emphasis supplied)

Thus the President was here required to "find" in the first instance an acute shortage of public works in the "area" of Belle Haven; in addition, he was required to "approve" the particular means adopted by the Federal Works Administrator to relieve such shortage.

Congress was insistent that both such safeguards be in the statute, see 87 Cong. Rec. 5090-5093; and it was assured by Senator Maloney that

> "The bill provides that it shall be administered by the Federal Works Administrator, although it also requires that whatever he does must be with the approval of the President of the United States, and that nothing may be done except with the President's approval. (87 Cong. Rec. 5090.)
>
> * * * * *
>
> Mr. Bone: Let me understand if this assumption is correct, that under the bill the President will define the defense areas, and having made such definition, the sole discretion to give or withhold grants-in-aid or outright grants will vest in the Administrator. Is that correct?
>
> Mr. Taft: Under the bill he is authorized, with the approval of the President, to do these various things; so that the President must approve.
>
> Mr. Maloney: The President has sole discretion, as a matter of fact." (87 Cong. Rec. 5093.)

Here the only finding made by the President could have had no relation to Belle Haven; and the petitioner concedes that the President did not approve this taking, contending that such approval was unnecessary under the circumstances. (Brief for Petitioner, p. 25).

1. There was no finding of a shortage of sewer facilities in Belle Haven or which the Belle Haven system could alleviate.

The only action by the President which is relied on as showing compliance with the Act was his letter dated March 11, 1942 (R. 36), finding an "acute shortage of public works" in "various" places in Fairfax County (an area of over four hundred square miles). It is difficult to see how this finding could have had any relation to Belle Haven. As has been seen, there was no shortage of sewer facilities in Belle Haven itself, and a sewer system on top of Belle Haven hill was not usable by the trunk system running past the foot of the hill and operating by gravity alone. Moreover, the original petition for condemnation, filed on December 13, 1944 (R. 1), encompassed merely a right of way through the west outfall of the Belle Haven sewer system, at the foot of the hill. The main Belle Haven system was not taken until April 8, 1948, under a second Amended Petition. (R. 9). It is apparent that the taking of the Belle Haven system was an afterthought and that no finding was made with respect to it.

2. The President never approved the taking of the Belle Haven system.

Not only was there no preliminary finding in relation to the Belle Haven system, but the taking was never approved by the President as an appropriate means for relieving the condition found to exist elsewhere in Fairfax County. As stated by the First Circuit in the Puerto Rico case:

> "* * * From the text of the act and from the legislative history we are satisfied that the President is required to approve at least in main outline the particular plan, program, or project formulated by the Administrator for the relief of the defined shortage of public works or equipment therefor, before the Administrator is authorized to proceed. It is not enough that the President, after finding the existence of an

acute shortage of public works in a given area or locality, should give the Administrator authority, carte blanche, to relieve such shortage by any of the various methods described in § 202 which the Administrator might thereafter deem expedient." *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 495.

Here the only "approval" suggested is the last sentence of the President's letter. This letter was identical to the President's letter involved in the Puerto Rico case, where it was held insufficient, 131 F. 2d 496, n. 5. This carte blanche authority was clearly not an "approval", even "in main outline", of the taking of an existing sewer system six years later.

II.

THE TAKING WAS EXPRESSLY FORBIDDEN BY THE 1943 AMENDMENT TO THE LANHAM ACT.

A. There was no allotment of funds for additions or improvements to the Belle Haven sewer system.

The District Court rested its conclusion that the taking was unauthorized on the 1943 amendment to the appropriations provision of the Lanham Act, which provided as follows:

> "None of the funds authorized herein shall be used to acquire public works already operated by public or private agencies, except where funds are allotted for substantial additions or improvements to such public works and with the consent of the owners thereof * * *." (Act of July 15, 1943, 57 Stat. 565, 42 U. S. C. 1534, note.)

The District Court stated:

> "* * * It appears to me that the Belle Haven sewer system was undoubtedly 'public works already operated by' a private agency. If that be true, even though it be conceded for the sake of argument, that funds were allotted for substantial additions or improvements, was the taking with 'the consent of the

owners thereof?' I should think that the consent referred to would mean an unconditional consent, and intervenors contend that the consent of Belle Haven Realty Corporation was only a conditional consent. However, even if it be conceded that the necessary consent was obtained from Belle Haven Realty Corporation; was that sufficient? The Government's brief and amendatory paragraph refer to Belle Haven Realty Corporation as the '*purported owner*'. There is no such language as that in the statute. The statute says '*consent of the owners.*' Assuming the correctness of my previous holding that the property owners who had purchased from Belle Haven Corporation owned easements in and to the sewer system, were they not also owners *pro tanto* of the sewer system? If the property owners were in fact part owners of the sewer system, no consent having been obtained from them, how can the Government's taking be justified?" (R. 39-40).

The petitioner, in its brief to this court, limits its discussion to the requirement of "consent of the owners." It does not discuss the further limitation, i.e., "where funds are allotted for substantial additions or improvements to such public works", except to say that it involves a question of fact which has not been determined (Brief for Petitioner, p. 24). The record on this point consists of allegations by the intervening property owners (R. 12), supported by an engineer's affidavit (R. 34), and not controverted by the Government. These allegations are to the effect that there were not only no "substantial" additions or improvements to the Belle Haven system, but absolutely *no* additions or improvements to that system. The only things that happened to it were that the Federal Works Agency illegally diverted to its own use one of Belle Haven's outfalls, blocked off both outfalls, and flowed the Belle Haven sewage into the river through the Government's main instead of Belle Haven's main. There has been no suggestion that Belle Haven's outfalls were not entirely adequate for its sewage. The District Court found that

"the Belle Haven subdivision had a completely integrated sewer system with outfalls into the Potomac River" (R. 37); and that "the Belle Haven householders had a sewer system ample for their needs" (R. 38).

The District Court made no finding on this point, stating that

> "even though it be conceded for the sake of argument, that funds were allotted for substantial additions or improvements, was the taking with the 'consent of the owners thereof'?" (R. 39).

We submit that the question was properly before the court on a motion to dismiss. Like the consent of the owners, this point involved an express condition precedent to any taking of an existing utility, yet the petitioner failed to plead compliance with either condition. It is well settled that, where a statute authorizes condemnation of private property only after certain conditions are satisfied, the satisfaction of such conditions must be pleaded and shown. *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 496 (1st Cir. 1942); *Cincinnati* v. *Vester*, 281 U. S. 439 (1930); *Miss. and Rum River Boom Co.* v. *Patterson*, 98 U. S. 403, 406 (1879). We accordingly submit that the dismissal was proper for this reason, as well as for the lack of consent.

B. The "consent of the owners" was not obtained.

The petitioner contends that the consent of respondent Belle Haven Realty Corporation to the taking was obtained and that the consent of respondent property owners was unnecessary.

1. The consent of the corporation was given on a condition which was violated by the petitioner.

After the Belle Haven outfalls had been blocked off the Realty Corporation agreed to condemnation of the rest of

the system on condition that no service charges be imposed against the then or future owners of property in Belle Haven for the use of their own system. (R. 37). When petitioner's lessee, Fairfax County, commenced to charge the property owners two dollars a month for the use of their sewer system (R. 38), this condition was obviously violated. It seemed to the District Court, and now seems to respondents, perfectly clear that the petitioner could not bring itself within the exception on the basis of a conditional consent where the condition was not fulfilled.

An essentially similar situation was before the Fourth Circuit in *United States* v. *Southern Power Co.*, 31 F. 2d 852 (1929). There the Federal Government condemned for forestry purposes land which was traversed by power lines; and agreed with the power company

> "that when the Government had obtained title, it would grant a permit to defendant for a nominal consideration, authorizing it to continue to maintain its right of way and operate its power lines over the land condemned. . . .
>
> "No permit has been granted to the defendant under the agreement; and the Government is now asking that defendant be enjoined from maintaining its power transmission lines over the lands in question, unless and until it shall apply to the Federal Power Commission for a permit, and shall agree to the conditions to be prescribed by that Commission." 31 F. 2d 853.

The court concluded that the statutes under which the Government was proceeding in that case did not authorize the taking of defendant's rights-of-way, and then said:

> "Finally, we think that the injunction was properly denied, because the Government, not having complied with its agreement to grant a use permit to defendant, is not in a position to invoke the aid of a court of equity." 31 F. 2d 858.

2. The owners of property in Belle Haven were "owners" of their sewer system within the meaning of the amendment.

The owners of lots in Belle Haven paid for the sewer system, pro-rata, as part of the purchase price of their lots (R. 37). The lot-owners accordingly alleged that they were in equity the owners of the system (R. 30-31). The District Court concluded that in any event they had easements appurtenant in the system; and on that basis the court stated that

> "I do not feel any doubt that they were included amongst the 'owners' of the property sought to be acquired." (R. 40).

The Court of Appeals agreed that the petition was properly dismissed on this ground, stating:

> "We think that this was correct, whether the ownership of the system be regarded as being in the Realty Corporation or in the lot owners who had paid for it and whose rights and easements constituted the only real value that it had. The lot owners could not be deprived of these rights and easements without just compensation; and it is reasonable to interpret the consent required by the statute as applying to them as well as to the Realty Corporation which had built the system but whose interest therein no longer had any appreciable value." (R. 48-49).

The petitioner contends here that it would be absurd to consider all the users of a utility as its "owners." (Brief for Petitioner, pp. 19-22). This seems to be beside the mark. Ordinarily the users of a utility have not paid for it, are not required to use it, and do not have easements in it.

We submit that the lot owners, who had paid for the Belle Haven system, were "owners" of the system, in equity. Even without their easements they would have been entitled to share in any condemnation award.

> "It is settled that when a parcel of land is taken by eminent domain, every person having an estate or interest at law or in equity in the land taken is entitled to share in the award. The term 'owner' in statutes relating to the exercise of eminent domain includes any person having a legal or equitable interest in the property condemned. A mortgagee of real property sought to be condemned or a mortgagee's assignee or grantee is 'owner' or 'person interested in property', and as such and to the extent of the interest is entitled to share in the distribution of the compensation judgment." *Swanson* v. *U. S.*, 156 F. 2d 442, 445 (9th Cir. 1946), *cert. denied*, 329 U. S. 799 (1947).

Or if the lot owners had only easements in the system, which is the least they had, such easements were ownership interests. *U. S.* v. *General Motors Corp.*, 323 U. S. 373, 377-378 (1945); *U. S.* v. *Welch*, 217 U. S. 333 (1910); *U. S.* v. *Sunset Cemetery*, 132 F. 2d 163, 165 (7th Cir. 1943); *U. S.* v. *Certain Lands at Great Neck*, 49 F. Supp. 265 (E. D. N. Y. 1943).

We accordingly submit that under any statute relating to condemnation the owners of easements appurtenant would be included within the term "owners." Here that result would seem to be particularly required in view of Congress' expressed opposition to takings of operating utilities. We submit that Congress would obviously have been shocked at even the suggestion of a taking, with Lanham Act funds, which would deprive an established residential community of its operating sewer system without its consent.

CONCLUSION

Respondents submit that the taking of the Belle Haven sewer system was not authorized by the Lanham Act, and was affirmatively forbidden by the amendment to that Act in 1943. The judgment below should be affirmed.

Respectfully submitted,

FREDERICK A. BALLARD,
American Security Building,
Washington, D. C.

JOSEPH W. WYATT,
Wyatt Building,
Washington, D. C.,
Attorneys for Respondents.

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